

WILLIAM DEMOSKI

IBLA 96-140

Decided March 4, 1998

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying reinstatement of Native allotment application F-026961.

Set aside and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Where a Native allotment applicant filed a Native allotment application prior to Dec. 18, 1971, and BLM rejected the application in 1961 because the land was prospectively valuable for oil and gas, and the applicant failed to execute the required waiver document, administrative finality should not serve as a bar to reinstatement of the application where the regulatory authority on the part of BLM to request a waiver was questionable and that requirement had been abolished within 1 year.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Applications and Entries: Reinstatement

The question whether BLM should properly reinstate a Native allotment application is separate and apart from the issue of the Department's ability to transfer the lands described in the application. The Department has jurisdiction to address issues concerning reinstatement even though the lands described in the application have been congressionally conveyed.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Where title to lands is conveyed to a Native Corporation pursuant to the Alaska National Interest Lands

Conservation Act, the Department of the Interior has a duty to Native allotment applicants whose claims lie within such conveyed lands to make a preliminary determination as to such applications and to pursue recovery of such lands where appropriate.

APPEARANCES: Christine A. McLeod, Esq., Andrew Harrington, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Appellant; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

William Demoski has appealed from a Decision dated December 4, 1995, by the Alaska State Office, Bureau of Land Management (BLM), denying reinstatement of Native allotment application F-026961.

On October 31, 1960, the Bureau of Indian Affairs filed Native allotment application F-026961 on behalf of William Demoski pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). Demoski's application indicates use and occupancy since 1954, of approximately 160 acres within secs. 9, 10, and 16, T. 10 S., R. 11 E., Kateel River Meridian, Alaska.

The Act of May 17, 1906, authorized the Secretary of the Interior to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land upon satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. §§ 270-1 and 270-2 (1970). The Act of May 17, 1906, as amended by the Act of August 2, 1956, 48 U.S.C. § 357 (1958), was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1617(a) (1994), effective Dec. 18, 1971, subject to applications pending on that date. Section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1994), provides that all Native allotment applications pending before the Department on or before December 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section.

On August 25, 1961, BLM issued a Decision styled "Application held for Rejection, Mineral Waiver Required" on Demoski's allotment application. That Decision notified Demoski that the lands for which he had applied were prospectively valuable for oil and gas and that the Act of March 8, 1922, 43 U.S.C. §§ 270-11, 270-12 (1976), 1/ required the rejection of Native

1/ The Act of Mar. 8, 1922, was repealed by Pub. L. No. 94-579, Title VII, § 703 (a), Oct. 21, 1976, 90 Stat. 2789, effective on and after the 10th anniversary of the date of approval of the Act, Oct. 21, 1976. The regulation at 43 C.F.R. § 2093.3-3(d) provides for the filing, by an applicant who wishes to request a classification of the land as nonmineral, of "preferably the showing of experts" that the land is not valuable for the minerals for which it was classified.

allotment applications which had been determined to be valuable for oil and gas, unless the applicant filed a waiver of the Government's oil and gas reservation. Along with its August 25, 1961, Decision, BLM provided Demoski a waiver form and afforded him 60 days within which to either execute and file the waiver form or petition for reclassification of the lands as nonmineral in character. Additionally, BLM warned Demoski that failure to take one of these actions, or to appeal the Decision, would result "in final rejection of the application and the [closing of the case] as of record in this office without further notice to the applicant."

Demoski did not take either of the actions offered in BLM's Decision, nor did he appeal that Decision. Accordingly, on October 28, 1961, without further notice to Demoski, BLM closed the case on its records.

On July 6, 1983, and March 5, 1985, the surface and subsurface estates of the land in Demoski's allotment were conveyed to Gana-a 'Yoo, Limited (Interim Conveyance No. 682), and Doyon, Limited (Interim Conveyance No. 1004), pursuant to ANCSA, 43 U.S.C. §§ 1601, 1613, and 1621 (1994).

On May 18, 1995, the Tanana Chiefs Conference filed a request for reinstatement of Demoski's application. Attached to the request was an Affidavit by Demoski attesting to his use of the lands beginning in 1954.

In the Decision now before us on appeal, BLM asserts that in its August 25, 1961, Decision, it adjudicated Demoski's application in accordance with the then applicable regulations and that Demoski had provided no compelling legal or equitable reasons for reinstating the application. The BLM therefore denied reinstatement.

Demoski argues that his application was erroneously rejected because a factual hearing was not held, that it was pending before the Department on and before December 18, 1971, and that it must either be legislatively approved or adjudicated pursuant to ANILCA. In support of this argument, Demoski cites Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985), as well as a number of decisions of this Board. Demoski alleges that his application was closed in error without permitting him a hearing on the issue of the mineral character of the land. Under Pence v. Kleppe, Demoski asserts, BLM must "provide the applicant with notice of the specific reasons for the proposed rejection and an opportunity for a hearing." (Statement of Reasons at 8.)

Demoski cites Billy Morry, 72 IBLA 13 (1983), for the rule that an allotment applicant disputing the mineral classification of the land embraced by his application is due a Pence hearing.

Finally, Demoski argues that administrative finality does not preclude reinstatement of his application.

The BLM answers that the doctrine of administrative finality bars Demoski from questioning the correctness of the August 25, 1961, Decision holding his application for rejection. (Answer at 8.) The BLM asserts

that Demoski took no action, that other interests have intervened, and that no equitable considerations have been shown which would justify reconsideration.

The BLM points out that the Pence v. Kleppe prescription for a hearing is triggered by an applicant's request for a hearing. (Answer at 8, 11.) The BLM asserts that Demoski would certainly have been granted a hearing in 1961, had he requested one. (Answer at 11.) The BLM also cites Billy Morry, supra, but contends that since Demoski never disputed classification of the land as valuable for oil and gas, he cannot now argue that his application was erroneously rejected because he was not afforded an opportunity for a hearing. ^{2/}

Insofar as addressed herein, the parties' other arguments have been considered and rejected.

[1] As articulated in Pence v. Kleppe, due process requires, at a minimum, the following:

[A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143.

The BLM is required by section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1994), to reinstate, for purposes of either legislative approval or adjudication, any Native allotment application that was erroneously rejected by the Department without an opportunity for a hearing on a disputed question of fact, as required by Pence v. Kleppe. See S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5182; Ellen Frank, 124 IBLA 349, 351-52 (1992). This is so even if an applicant was notified of an earlier rejection and no appeal was taken, since lack of compliance with Pence v. Kleppe vitiates the administrative finality that would otherwise attend the rejection. Heirs of George Titus, 124 IBLA 1, 4 (1992), and cases there cited.

In the case before us, Demoski was provided with three alternatives by BLM's 1961 Decision. However, that Decision was not final because he was not afforded an opportunity for hearing. The above authorities leave no

^{2/} In Billy Morry, there was confusion in the Government's own records as to whether the land should or should not have been classified valuable for minerals. In addition, the allotment applicant in that case retained a geologist and requested the opportunity to present evidence to challenge the Government's classification of the land as valuable for minerals. Id. at 14-15.

doubt that the onus is on the Government to extend the opportunity for a hearing and not on the Native allotment applicant to request one. We cannot agree with BLM that the option to petition for reclassification is synonymous with the tender of an opportunity for hearing, as required by Pence v. Kleppe. More importantly, as Demoski points out, not only was the regulatory authority for requesting a waiver in 1961 suspect, but in less than 1 year thereafter, the requirement that an allotment applicant file such a waiver had been abolished. See generally Milton H. Lichtenwalner, 69 Interior Dec. 71, 73 (1962).

[2] While the Department cannot adjudicate interests in land to which it does not have title, Bay View, Inc., 126 IBLA 281, 287 (1993), the matter on appeal is not the adjudication of Demoski's right to the allotment, but whether reinstatement of a closed Native allotment application was required.

[3] In Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), the District Court held that, where the land sought by a Native allotment applicant had been previously conveyed out of Federal ownership and, therefore, was no longer subject to the Department's adjudicatory jurisdiction, the Department nevertheless retained the responsibility of making an initial determination as to the validity of the allotment claim as a prerequisite to deciding whether or not the Government should bear the burden of going forward with a suit to annul the patent and thereby restore adjudicatory jurisdiction over the land in question to the Department.

Thus, the required legal course is to set aside BLM's Decision denying reinstatement of the allotment application and remand the case to BLM for a preliminary determination consistent with Aguilar v. United States, supra; see Bryant Conway, 135 IBLA 261, 262-63 (1996).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside and the case remanded for further action consistent with this opinion.

James P. Terry
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING SPECIALLY:

While ultimately in agreement with the conclusion reached in the lead opinion, I feel compelled to write separately in order to draw attention to what, I would submit, is evidence of a general lack of consistency in Board adjudications of appeals relating to the reinstatement of Native allotment applications which had been rejected by the Department prior to the adoption of section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1994). Any analysis of recent Board decisions on this issue must lead ineluctably to the conclusion that entire lines of precedents coexist in fundamental conflict. The result is that the ultimate outcome of an appeal can become dependent not upon universally applied principles but rather on which line of precedent an individual panel deems appropriate to embrace for purposes of deciding any specific case. The result, of course, is to foster both unpredictability and randomness in adjudicatory results.

While I would agree that blame for this decisional disarray cannot be solely ascribed to the Board, I believe that the responsibility must devolve upon us, as the appellate tribunal with the greatest day-to-day responsibility for deciding these issues, to attempt to resolve some of the internal conflicts which are now manifest in our precedents as a first step toward restoring precedential consistency to this area of the law.

The starting point for any analysis of the difficulties presented by appeals involving reinstatement of previously rejected or terminated Native allotment applications must be the Board's original decision in Mary Olympic, 47 IBLA 58 (1980), as modified in Mary Olympic (On Reconsideration), 65 IBLA 26 (1982).

At the outset, it is important to remember that the Board's decision in Mary Olympic, *supra*, was issued prior to the adoption of ANILCA. In Olympic, the Board affirmed the Bureau of Land Management (BLM or Bureau) refusal to reopen the Native allotment application of Alexis Gregory, Olympic's father. As recounted in that decision, Gregory had applied for an allotment on July 5, 1960, alleging use and occupancy of the described parcel of land since 1922. Gregory claimed that the improvements included a log cabin and two wood caches and the application was accompanied by witness statements attesting to his use of the land. A field examination conducted on March 25, 1961, however, failed to locate any improvements on the described land. A second field investigation in September 1963 ended with similar results. The Bureau thereafter notified Gregory that it had been unable to find any improvements on the land sought and advised him that, if the original description was in error, he should submit a correct description of the land.

Though Gregory received the letter, no reply was forthcoming. Subsequent attempts in 1967 to contact Gregory proved fruitless and, on October 13, 1967, BLM issued a decision rejecting the allotment application. This decision was returned marked "deceased," and the case file

was closed. In 1975, his daughter informed BLM that Gregory had died in early 1967 and requested that the allotment file be reopened so that she could show the area in which Gregory's improvements were located and for which he had intended to file. When BLM refused, she appealed to the Board.

The Board rejected Olympic's appeal on two separate grounds. First, it held that the application did not come within the scope of the Alaska Native Claims Settlement Act (ANCSA) savings clause for Native allotments since it was not "pending before the Department of the Interior on December 18, 1971," as required by that statute. See 43 U.S.C. § 1617(a) (1994). Second, the Board held that, while the application had shown prima facie entitlement to an allotment since it described land otherwise available and asserted the required use and occupancy, it did not create an inheritable right in Olympic since BLM had established that, in fact, Gregory had not used the land described in the allotment application. Thus, the Board held that Olympic held no equitable interest in the allotment application which would allow her to seek to have the file reopened and to amend the description.

Both BLM and Olympic petitioned for reconsideration of the Board's decision. The Board granted reconsideration but reaffirmed its decision in Mary Olympic (On Reconsideration), *supra*. In this decision, the Board first rejected Olympic's argument that she had the right to amend her father's application, expressly reiterating its conclusion that the preference right to an allotment could attach only to the lands described in the application and that, while an allotment applicant could amend an application to correctly describe lands sought, the right to file an allotment application (as well as the right to amend the land description) was personal to the applicant and could not survive an applicant's death. The Board also expressly held that nothing in section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1994), compelled a different result. 65 IBLA at 30-32.

The Board then turned to the question on which both sides had sought reconsideration, *viz.*, whether BLM had any authority to reopen a closed appeal after the repeal of the Native Allotment Act. The Bureau, in particular, argued that if the allotment application had been erroneously rejected (for example, in violation of the due process restrictions imposed by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976)), BLM had the authority to reopen an application.

On this issue, too, the Board reaffirmed its previous holding. The Board first examined the impact of the Pence litigation on this question:

While we agree that the decisions in Pence v. Andrus, [586 F.2d 733 (1978)], and Pence v. Kleppe, *supra*, are to be applied retroactively, we are of the opinion that, where the Department had finally rejected an application for allotment, and neither an

appeal to the Federal courts nor a petition for reconsideration was pending on December 18, 1971, the Department not only does not have an obligation to reopen the file, it lacks the authority to do so.

Decisions of courts as to what the law is are presumptively retrospective in scope. This presumption is based, as many courts have noted, on "the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been." Cash v. Califano, 621 F.2d 626, 628 (4th Cir. 1980). See also Zweibon v. Mitchell, 606 F.2d 1172, 1175-77 (1979). While a number of recent judicial pronouncements, particularly in the field of criminal law, have limited the effect of decisions to prospective effect only, or alternatively provided for only partial retroactive effect, such actions have been based on considerations of fairness and public policy. See, e.g., In Remarriage of Brown, 544 P.2d 561, 568-69 (Cal. 1976); Li v. Yellow Cab Co., 532 P.2d, 1226, 1244 (Cal. 1975).

* * * * *

Other decisions, however, have determined, in the absence of questions of fairness or public policy, that a newly enunciated rule should be applied with full retroactivity. See Cash v. Califano, *supra*; Barber v. State Personnel Board, 556 P.2d 306 (Cal. 1976). In the context of the issue before us, we have no doubt that the Pence court expected that its decision would be applied with full retroactivity. Indeed, this has been the consistent practice of the Board. We applied the Pence decision to all cases then pending before us. See, e.g., John Moore, 40 IBLA 321, 86 I.D. 279 (1979). We entertained petitions for reconsideration of decisions issued prior to Pence and, where the Pence requirements of notice and an opportunity for hearing applied, we have not hesitated to vacate our prior decision and remand the case for further proceedings in conformance with Pence. See Louise Luke (On Reconsideration), 60 IBLA 339 (1981); Mary Ayojiak, 59 IBLA 384 (1981). And it is clear that BLM has applied the Pence principles to all cases which had been filed before it, but not yet adjudicated.

The Solicitor's Office, however, is apparently of the view that the Pence ruling is retroactively applicable to cases already finally decided by the Department. This is not correct.

As Circuit Judge J. Skelly Wright noted in Zweibon v. Mitchell, *supra*:

Historically, prospectivity has been less common in civil than in criminal cases. This is at least partly due to the potential flood of habeas corpus petitions that looms if a court recognizes retroactively a procedural or substantive right of criminal

defendants. No such threat arises in civil litigation where a retroactive decision can affect only suits pending in the courts or not yet brought, but cannot be raised by previously unsuccessful litigants. The prospectivity determination in both civil and criminal cases, however, remains a pragmatic one that turns on the expected impact of a retroactive overruling on the society and legal system. Retroactivity is the rule, but not at the expense of other important values. [Emphasis supplied; footnotes omitted.]

Id. at 1176-77. Similarly, the California Supreme Court in Barber v. State Personnel Board, *supra*, rejected an argument that applying its ruling invalidating disciplinary procedures for permanent civil service employees retrospectively would cost the State hundreds of thousands of dollars in back pay to employees who were properly discharged. Among other factors, the Court noted that only a small number of litigants would benefit since "virtually all of the litigation involving this issue has become final. Under [the applicable procedures] all those proceedings in which the employee did not answer the accusations or withdrew the answer are final." Id. at 309.

65 IBLA at 34-35. Based on the foregoing analysis, the Board expressly held that use of the phrase "pending before the Department on December 18, 1971," in ANCSA "effectively finalized the rejection and removed any authority that BLM might have possessed to reconsider its rejection," explicitly holding that this result would obtain "[e]ven had Alexis Gregory's application described the land which he occupied and even if BLM's decision was demonstrably in error." Id. at 35.

The Board decision, however, failed to consider the impact of section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1994), on this analysis. That section provided a process for the adjudication or legislative approval, under certain conditions, of Native allotment applications "which were pending before the Department of the Interior on or before December 18, 1971." 43 U.S.C. § 1634(a) (1994) (emphasis supplied). Congress explained its intention in adding the underlined phrase as follows:

An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section.

S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in 1980 U.S.C.C.A.N. 5182. Obviously, this amendment seriously undercut the Board's analysis of the "authority" of BLM to reinstate Native allotment

applications rejected prior to December 18, 1971, and the decision's failure to discuss this provision was a critical oversight. 1/

Olympic subsequently sought judicial review of the Board's decisions. See Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985). This decision, unfortunately, contained no extended analysis by the court of the impact of section 905(a) of ANILCA because the Justice Department had essentially confessed error with respect to the Board's second holding in Mary Olympic (On Reconsideration), *supra*. Thus, the court's decision simply noted that "the government now concedes that § 905(a) provides for legislative approval of Gregory's allotment as described in Gregory's original application, and that Gregory's heirs are entitled to the land therein described." *Id.* at 992-93. The problem, however, is that while the Board's rationale was clearly not sustainable on appeal, the confession of error by the Justice Department obscured a basic question whether, even assuming that ANILCA had vested in BLM the "authority" to reinstate allotment applications which the Board had previously found lacking, the Gregory application, as a factual matter, ought to be reinstated. More specifically, the conclusion which everyone assumed but did not examine was that the initial rejection of Gregory's application violated the hearing requirement of Pence. As I will attempt to show subsequently in this opinion, this was not the case.

In any event, even before issuance of the Olympic decision by the district court, the Board had begun adjudicating questions relating to the applicability of section 905(a) of ANILCA. The decision in Frederick Howard, 67 IBLA 157 (1982), was the first to address this issue. In that case, Frederick Howard had filed a Native allotment application on December 22, 1966, seeking two parcels of land aggregating a total of approximately 40 acres. The application stated that occupancy had commenced in June 1964. In 1967, BLM advised Howard that the land sought would be subject to an oil and gas reservation and reminded him that, under the applicable regulations (at that time, 43 C.F.R. § 2212.9-3(f) (1967)), he was required to submit proof of use and occupancy no later than 6 years after the date of his application, i.e., by December 22, 1972. 2/ Howard was subsequently reminded of this requirement by notice dated June 19, 1972. When nothing was submitted, BLM sent Howard a notice, dated April 23, 1973, informing him that his allotment application had been terminated for failure to submit the evidence required by the regulation. No appeal was taken from this notice.

In 1980, Howard sought reinstatement of his application under section 905(a) of ANILCA. Relying on the legislative history of section 905(a), BLM took the position that applications which had already been

1/ This oversight was doubtless facilitated by the fact that all of the briefing on reconsideration occurred prior to the adoption of ANILCA.

2/ This 6-year filing rule is frequently referred to as statutory or "stat." life.

rejected prior to the adoption of ANILCA were only subject to reinstatement if they had been erroneously rejected. Arguing that Howard's application had properly been rejected since he had failed to comply with the regulations requiring submission of proof, BLM declined to reinstate Howard's application. Id. at 158-59.

Though IBLA disagreed with BLM's conclusion, it did so on a basis not explored below. Noting that the legislative history established that the phrase "or before" had been added to clarify that "applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for a hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section," the Board differentiated between applications rejected before December 18, 1971, and those rejected after that date. Insofar as those applications rejected before ANCSA's adoption were concerned, IBLA agreed that a precondition for reinstatement was the showing that the initial rejection was in error. However, the Board ruled that, insofar as applications rejected after ANCSA's adoption were concerned, the limitation of legislative approval or adjudication to cases "erroneously" rejected did not apply. In other words, Howard held that where a Native allotment application was rejected after December 18, 1971, it was automatically subject to the provisions of section 905(a) without any examination of whether or not the initial rejection could be deemed "erroneous." Id. at 159-60.

While the Board had occasion to frequently venture into the general arena of Native allotment adjudications in the years immediately subsequent to the Howard decision, it was not until 1989 that it had occasion to again examine questions relating to the reinstatement of rejected and terminated allotment applications. 3/ Commencing in 1989, however, the Board frequently, if not with great consistency, dealt with the reinstatement issue.

The first case which is important to consider is the decision in State of Alaska, 109 IBLA 339 (1989). This decision involved an appeal by the State of Alaska from a BLM decision holding Hazel L. Barlip's Native allotment application for approval as to 120 acres of land. This acreage had been part of a total of 160 acres which had been included in Barlip's original application which she had filed on November 19, 1962. In a decision dated December 17, 1975, BLM held that Barlip had used and occupied

3/ There were, throughout this period of time, a number of decisions relating to the reinstatement of "relinquished" Native allotment applications. See, e.g., Heirs of Alexander Williams, 121 IBLA 224 (1991); Theodore Suckling, 121 IBLA 52 (1991); Heir of Frank Hobson, 117 IBLA 368 (1991); Heirs of Linda Anelon, 101 IBLA 333 (1988); Matilda Titus, 92 IBLA 340 (1986). The issues presented by the cases involving relinquished applications, however, are sufficiently different from those which arise with respect to rejected or terminated applications as to justify separate treatment. They will not, therefore, be considered in the context of this opinion.

40 acres but that she had failed to show the requisite use and occupancy with respect to the remaining 120 acres. She was not afforded a hearing as to the excluded acreage, since the BLM rejection occurred prior to the Pence decisions. A certificate of allotment was issued on August 26, 1977, covering these 40 acres.

On June 17, 1981, BLM reinstated Barlip's application as to the excluded 120 acres. By decision dated October 9, 1986, BLM reversed the December 17, 1975, decision to the extent that it had excluded the 120 acres from the Barlip's allotment claim and rejected a State selection application to the extent of the conflict between it and Barlip's allotment application. On appeal by the State, the Board affirmed BLM.

While the ultimate result of the State of Alaska appeal appears not inconsistent with the law, it is difficult to explain the tack which the Board's analysis took. Notwithstanding the fact that it was undisputed that Barlip's application had been filed in 1962 and was not adjudicated until 1975, the Board, for some reason difficult to fathom, concluded that the first question to be examined was whether Barlip's application was pending on December 18, 1971. Id. at 343. To determine this question, which presumably could have been resolved merely by reviewing the calendar, the Board examined the district court's decision in Olympic v. United States, supra. The Barlip decision suggested that, not only had the court directed the reinstatement of Olympic's father's application, but that the court had "further found that the reinstated application should be considered as pending on December 18, 1971." Id.

This latter assertion is simply wrong. There is nothing in the court's decision the even suggests such a finding. Indeed, given the fact that the court relied on section 905(a) of ANILCA in reinstating the claim, there was no need to even inquire whether the application was pending "on December 18, 1971." The emphasis which this Board had attached to that phrase in its Olympic cases was the direct result of the fact that the savings clause of ANCSA limited its scope to claims which were pending "on December 18, 1971." By contrast, ANILCA expressly provided that allotment applications were subject to legislative approval or adjudication, under certain conditions, if they were pending "on or before December 18, 1971."

Thus, while IBLA had, indeed, previously emphasized the importance of determining whether or not a claim was "pending on December 18, 1971," the relevance of such a determination had clearly dissipated under ANILCA and the court made no finding at all that the Gregory application had been pending "on" December 18, 1971. Unfortunately, as will be seen below, this mischaracterization of the court's holding in Olympic was picked up and expanded upon in a number of subsequent decisions of the Board.

In Heirs of Sockpealuk, 115 IBLA 317 (1990), the Board dealt with three cases which dealt with application of what is generally referred to as "statutory life" concepts. See note 2, supra. In all three cases, applications were filed in 1959 alleging use and occupancy of available land from at least 1947. In all three cases, BLM informed the applicant

that he would have to submit proof of use and occupancy within 6 years of the date of filing. In all three cases, no further submissions were made and in 1965 separate decisions issued rejecting all three applications. No appeals were taken.

On December 17, 1986, requests were filed to reinstate all three applications, which requests were denied by BLM on November 10, 1987, and appeals were filed on behalf of the heirs of all three applicants. Before the Board, BLM argued that since these applications had not been erroneously rejected, ANILCA did not apply. Further, BLM contended that, because it was undisputed that the applicants did not file the requisite proof of use or occupancy within the time required, there was no violation of the Pence hearing requirement since there was no disputed issue of fact.

While IBLA reversed, it did not explain the basis for its action, beyond asserting that the Pence litigation and the district court decision in Olympic compelled this result. It was not until a decision 2 years later, in Heirs of Edward Peter, 122 IBLA 109 (1992), that any detailed legal analysis of the arguments which BLM had made in the Sockpealuk case was provided. The Edward Peter decision is examined, infra.

It should also be noted that, consistent with the approach enunciated in State of Alaska, supra, the decision in Sockpealuk asserted that, because the applicants had never been afforded a hearing prior to rejection, these applications "were pending before the Department on December 18, 1971." 115 IBLA at 326. Unlike the situation in the State of Alaska, however, where BLM had not rejected the application until after December 18, 1971, in Sockpealuk, BLM had issued the decisions rejecting the allotment applications prior to December 18, 1971. See Heirs of Sockpealuk, supra, at 326.

The next Board decision, Michael Gloko, 116 IBLA 145 (1990), presented a factual variant of the Sockpealuk situation. While, in the Sockpealuk cases, the applicants had alleged the completion of more than 5-years use or occupancy when they filed their applications, in this case, Gloko had filed his allotment application on July 17, 1961, alleging use and occupancy of a parcel of land commencing in 1961. The Bureau notified him in October 1961 that he was required to file proof of use and occupancy by July 16, 1967, and that, if he failed to do so, his application would "terminate without prejudice" to the filing of a new application. He was notified again of this requirement on March 30, 1967. No filing from Gloko was forthcoming and his application was closed by BLM on July 16, 1967, though there was no indication that BLM informed him of this fact. When BLM refused a request to reinstate the application, Gloko appealed. Once again, IBLA reversed BLM.

This time, the Board focussed not on whether Gloko's application had been erroneously rejected without an opportunity for a hearing but rather

on the question whether Gloko's application had ever been rejected. The Board concluded that it had not, expressly holding that

[w]e do not find that BLM's October 4, 1961, letter to Gloko, which notified appellant that his application "will terminate" on or about July 16, 1967, absent receipt of proof of use and occupancy, may be read to remove the need for a subsequent decision rejecting [his] application. Indeed, considering BLM's manner of handling other "statutory life" cases, it does not seem likely that BLM intended this letter as a final rejection of the application.

Id. at 150-51. Thus, since the Gloko application was "pending" on December 18, 1971, it was subject to either legislative approval or adjudication as provided in section 905(a) of ANILCA.

This decision essentially ignored the fact that the regulations in effect in 1967 provided that "[i]f the applicant does not submit the required proof within six years of the filing of his application in the land office, his application for allotment will terminate without affecting the rights he gained by virtue of his occupancy of the land or his right to make another application." 43 C.F.R. § 2212.9-3(f) (1967). Thus, the regulation, itself, provided for the automatic termination of an application if proof of use and occupancy were not submitted within 6 years of the filing of the allotment application and any decision which might issue was merely declaratory of what had automatically occurred. Moreover, the original regulation had, in fact, contained a notification-by-decision requirement, but this had expressly applied only to applications "filed prior to the effective date of this paragraph [December 6, 1958]." 43 C.F.R. § 67.5(f) (1963). If anything, the old maxim expressio unius est exclusio alterius would seem clearly applicable, particularly since Gloko had received direct notice twice of the filing requirements. Be that as it may, and despite the fact that the Gloko approach was expressly ratified in Andrew Balluta, 122 IBLA 30 (1992), there is grave doubt that this precedent survived the Board decision in Heirs of Edward Peter, supra. That question, however, will be dealt with below.

While the decision in Mitchell Allen, 117 IBLA 330 (1991), involved a reinstated Native allotment, the propriety of reinstatement was not directly addressed therein. Rather, that opinion dealt with the issue of amendments to land descriptions in Native allotment applications, an area of the law tangential to the issue of reinstatement of rejected or terminated applications. The decision is noteworthy, however, because of its discussion of the applicability of the concept of administrative finality to questions arising in Native allotment adjudication. The State of Alaska had argued that Allen's amendment was barred by administrative finality. In rejecting this argument, the Board noted:

[W]e agree with Allen that the doctrine of administrative finality does not bar consideration of this appeal. Not only was

BLM's 1988 decision based on a second amended application, but we also find that, even if the issues addressed were identical to those decided in 1984, sufficient equitable and legal reasons have been shown to warrant reexamining those issues. See, e.g., Turner Brothers Inc. v. OSM, 102 IBLA 111, 121 (1988), and cases cited therein.

Id. at 336.

The next decision, Franklin Silas, 117 IBLA 358 (1991), must be considered of major import both because of the analytical approach taken therein and the decision's subsequent history. Silas filed his application for an allotment on November 11, 1971, alleging use and occupancy of two separate tracts commencing September 1, 1965. His application was rejected by decision dated July 18, 1972, because two state selections had predated his use and occupancy. Though he received the decision shortly thereafter, he never appealed.

On December 27, 1982, BLM made interim conveyances of the land to Seth-da-ya-ah Corporation. On August 8, 1986, counsel for Silas sought reinstatement of the application on Silas' behalf, including with the request an affidavit from Silas asserting use and occupancy commencing in 1960 or 1961, rather than 1965. By decision dated June 9, 1988, BLM informed Silas that the State selection prevented legislative approval of his application and that it would have to be adjudicated under the Native Allotment Act. It further informed Silas that he had not shown sufficient use and occupancy to warrant an allotment but allowed him 60 days to submit more evidence, advising him that if inadequate evidence were submitted "action will be taken to allow for an oral hearing in accordance with Pence." Id. at 360.

Although Silas subsequently submitted three witness statements, BLM ultimately determined that the application was not properly reinstated in any event because the 1971 application had been rejected solely for a legal defect (the land was not available at the time that occupancy was asserted). Silas appealed alleging, inter alia, violation of the Pence hearing requirements. The Board affirmed the BLM decision, expressly holding that "[n]o Pence v. Kleppe hearing is required if, when taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law." Id. at 364. Thus, IBLA concluded that the application had been properly rejected in 1972 since, on its face, it was not allowable.

The Board also held that reinstatement of the application was only possible if Silas could show that the original application contained a significant error. Since the sole evidence of error was Silas' self-serving statements averring that occupancy had been commenced before the withdrawals and denying knowledge of how the initial dates were entered, the Board concluded that "Silas' failure to timely appeal BLM's decision, the

passage of 15 years before any action whatsoever was taken, and the lack of persuasive evidence supporting the existence of an error in the original application militate against any argument that an error existed on the original application" and that this was the "proper basis for rejecting the petition for reinstatement, rather than administrative finality." Id. at 365. ^{4/}

There is one obvious problem with the Silas decision. It is clearly inconsistent with the decision in Frederick Howard, *supra*. The Board in Howard had expressly held that, with respect to applications which were actually pending on December 18, 1971, there was no requirement that error in rejection be shown, since that requirement applied only to claims pending "before" December 18, 1971. Thus, under Howard, any claim rejected after December 18, 1971, was automatically reinstated and either legislatively approved or subject to adjudication as the case might be. In Silas, however, the Board refused to reinstate the application. Independent of the question of the allowability of Silas' belated attempt to amend his application, refusal to reinstate the application clearly contradicted Howard. ^{5/} The decision in Howard, however, was not even cited in Silas.

The Silas decision is notable not only because it marked a clear conflict in Board precedents but, more importantly, because the Silas case provided a vehicle for obtaining judicial consideration of some of the questions relating to the reinstatement of previously rejected allotment applications. The Board decision in Silas was initially upheld by the United States District Court in Silas v. Bruce Babbitt, et al., Civ. No. A93-035 CV (JKS) (D. Alaska July 31, 1995) and was then affirmed by the Ninth Circuit in a published decision styled Silas v. Babbitt, 96 F.3d 355 (1996). It thus represents the most recent judicial pronouncement by the Court of Appeals for the Ninth Circuit on the issue of the reinstatement of previously rejected Native allotment applications.

^{4/} By order dated Nov. 16, 1993, the United States District Court for the District of Alaska remanded this appeal to the Board for clarification of whether the Board's holding was based on "administrative finality or Silas' failure to provide evidence, or some combination of the two." See Franklin Silas v. Bruce Babbitt, et al., Case No. A93-035 CV (JKS) (Nov. 16, 1993).

By decision styled Franklin Silas (On Judicial Remand), 129 IBLA 15 (1994), the Board declared that administrative finality was not the basis for its ruling but rather the fact that "we found no compelling legal or equitable reasons for allowing a second opportunity to appeal the merits of the 1972 decision 15 years after the expiration of time for appeal from the 1972 decision." Id. at 16.

^{5/} While the Howard/Silas distinction may seem minor, it can result in major differences. Thus, for example, given a statutory life rejection decided after 1971, assuming no conflicting State or Native selections, Howard would treat the application as automatically reinstated and legislatively approved, while Silas would require a showing of error in the post-1971 adjudication as a precondition for reinstatement.

While the impact of the court's analysis will be more fully explored infra, suffice it for the present purposes to note that it explicitly held that section 905(a) of ANILCA "does not mandate the reopening of applications previously adjudicated under the [Native Allotment Act]." Id. at 358-59. This being the case, it is clear that the Ninth Circuit's Silas decision necessarily invalidated the theoretical basis of Frederick Howard, supra, since that latter decision proceeded on the assumption that allotment applications previously adjudicated under the Native Allotment Act were automatically subject to either legislative approval or readjudication. It must be concluded, therefore, that to the extent that the Board's decision in Silas undermined the continuing validity of the Howard precedent, the circuit court's decision effectively demolished it. But, as the case survey will show, Howard has continued to be cited in some Board decisions as if it were "good law."

In Andrew Balluta, 122 IBLA 30 (1992), the Board revisited the precedent established in Michael Gloko, supra, requiring actual notification of "termination" of a Native allotment, and completely reaffirmed it. Nevertheless, 11 days later the Board issued its decision in Heirs of Edward Peter, 122 IBLA 109 (1992), which effectively eviscerated the holding of Gloko and Balluta. While the facts in Edward Peter are complex (as is increasingly the case in Native allotment appeals), it is important that the Board's decision in that case be understood.

Briefly, Edward Peter filed a Native allotment application (Fairbanks 029185) for 115 acres on February 19, 1962, alleging occupancy of the land commencing June 1, 1961. The Bureau notified him on November 1, 1962, of the statutory life requirement that he submit proof of use and occupancy by February 19, 1968. He was again notified on September 1, 1967. By notice dated April 3, 1968, BLM informed Peter that his application "is terminated," and the case was subsequently closed on BLM records. No appeal was filed. Instead, on May 1, 1968, Peter filed a second Native allotment application (F-976) for 70.3 acres. In this latter application, Peter claimed use and occupancy of the described parcel since July 1, 1962, and claimed that the land in the second application contained improvements consisting of a fish rack, tent frame, and smokehouse. Peter died on September 25, 1968, and his heirs thereafter pursued the second allotment application, F-976.

While the field report for allotment F-976 was favorable and BLM issued a March 8, 1976, decision determining that Peter had shown compliance with the Native Allotment Act, the State of Alaska objected that part of the allotment impinged upon Akiachak Airport. The State also filed a protest under section 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C).

While the matter was set for private contest, an agreement between the heirs and the State was reached and the contest was ultimately dismissed on August 30, 1984. The Bureau subsequently reaffirmed its March 8, 1976, decision in a decision dated July 12, 1989. This decision also provided a 60-day period to challenge a survey of the allotment which had been filed on April 10, 1980.

While Peter's heirs initially indicated acceptance of the allotment, subsequently, on August 8, 1989, the heirs filed an appeal arguing that application F-976 was erroneous and unacceptable and instead sought approval of application Fairbanks 029185 since that application had contained more acreage.

The Board began its analysis of the legal issues presented by the Edward Peter appeal by noting that "[c]ases decided with administrative finality are not subject to reconsideration in the absence of compelling legal or equitable reasons for doing so." Id. at 113. The decision noted that the regulations in existence in the 1960's both when the original application was filed, 43 C.F.R. § 67.5(f) (1963), and when it was terminated, 43 C.F.R. § 2212.9-3(f) (1966), expressly provided for the automatic termination of allotment applications in the absence of submission of proof of use and occupancy. The decision explicitly held that Peter was "charged with knowledge of the regulation and therefore knew that the application terminated at that time" and further opined that "termination was required as a matter of law." Id. at 114. This, of course, implicitly contradicted both Gloko and Balluta, yet no reference was made to either of those decisions. 6/

The Edward Peter decision then turned to the question of whether or not termination of the original application had occurred in violation of the Pence hearing requirements. While the decision recognized that the Board had held in Heirs of Sockpealuk, supra, that reinstatement would be granted where BLM had rejected an allotment in violation of the Pence dictates, it sought to distinguish Sockpealuk on the basis that, in those cases, each of the applications had, on their face, alleged more than 5-years qualifying use and occupancy, and, thus, BLM's termination of the applications necessarily implied a factual determination contrary to the assertions made in the applications. In the Edward Peter case, by contrast, the application had asserted that occupancy had commenced less than a year prior to the filing of the application. Thus, in Edward Peter, the application, itself, did not assert qualifying use and occupancy, and, in the absence of such an assertion, the application could be rejected as a matter of law. Id. at 115. In essence, the decision in Edward Peter affirmed application of the "statutory life" rule to those Native allotment applications which did not, on their face, allege compliance with the requirement that qualifying use and occupancy be shown for 5 years.

The next decision dealing with reinstatement of terminated or rejected allotment applications was Heirs of George Titus, 124 IBLA 1 (1992). In

6/ Indeed, this holding is all the more remarkable since it was arguably unnecessary. Both Gloko and Balluta could have been distinguished on the ground that Peter had received actual notice of the termination of the allotment application. Yet, while the Board referenced this fact in the Peter decision, this was clearly presented as an alternative holding, not the ratio decidendi of the decision. Id.

this case, while Titus' original application did not state any date of use or occupancy, an amended application alleged occupancy of three separate tracts commencing on dates varying from 1916 to 1930. The application had been rejected by decision in 1968 for failure to show substantial use and occupancy for 5 years. While BLM subsequently reinstated this application on its own motion in 1979, and commissioned field reports which were favorable to the application, by decision dated April 27, 1990, BLM reaffirmed its original rejection of the application.

On appeal, consistent with the Sockpealuk/Peter analysis, the Board held that since there was a disputed issue of fact going to use and occupancy on the face of the application, a Pence hearing was required prior to rejection. The Board accordingly ordered the application reinstated and ordered BLM to adjudicate the validity of the application in light of conflicting State selections for the lands involved. ^{7/}

While cases involving the reinstatement of rejected or terminated Native allotment applications had heretofore concerned applications rejected no earlier than the 1960's, commencing with Ellen Frank, 124 IBLA 349 (1992), the Board began dealing with issues involved in the reinstatement of applications rejected in the distant past.

The decision in Frank involved a Native allotment application filed by John Reese on December 5, 1917. This application was initially approved by the First Assistant Secretary on September 20, 1920, and a survey was ordered. Before the survey could be completed, it was discovered that Reese had died, his wife had moved 60 miles away with no apparent intention of ever returning, and his improvements had been destroyed by a forest fire. A General Land Office (GLO) inspector reported these facts to the Commissioner of the GLO and recommended that Reese's application be rejected. On June 24, 1926, the Assistant Commissioner of GLO recommended to the Secretary of the Interior that the prior approval be revoked. The First Assistant Secretary revoked the previous approval on July 8, 1926, and on July 15, 1926, held the application for rejection but instructed the register in Fairbanks to allow the applicant 90 days in which to show cause why the application should not be rejected or to appeal from the notice. In the absence of any reply, the Commissioner rejected Reese's allotment application by decision dated November 26, 1927.

^{7/} But, while the decision in Titus was generally unremarkable, the Board managed to restate the State of Alaska mischaracterization of the holding of the district court in Olympic. Thus, the Board declared that the court held "that BLM's 1967 rejection did not prevent Gregory's application from being considered as 'pending' on December 18, 1971." Id. at 4 n.4. This is, as was explained earlier in the text, simply wrong. This misstatement in Titus, however, was soon replicated in Ellen Frank, 124 IBLA 349 (1992). See note 8, infra.

Nothing further happened until BLM reinstated the application on its own motion on February 21, 1986. A subsequent field examination found the burnt-out remains of a cabin along with a stove, cans, and washtubs. However, when BLM sought Solicitor concurrence in approving the allotment, the Solicitor demurred, arguing that the application had been finally rejected by the Commissioner in 1927 and should not be reopened. Reese's daughter, Ellen Frank, thereafter filed an appeal.

Frank argued that the Commissioner's 1927 rejection was void either because equitable title had already vested in the applicant as a result of the 1920 approval by the First Assistant Secretary or because the applicant and his heirs had not been afforded procedural due process. The Board, however, declared that it was unnecessary to resolve this question since there was "an important exception to the doctrine of administrative finality" in cases in which an allotment application had been rejected without an opportunity for a hearing on a disputed issue of fact. The Board concluded that there was such a disputed issue of fact, namely, "whether Reese's widow wanted the land originally sought by him." Adverting to a pending State selection covering the same land, the Board ordered that Reese's application be adjudicated under the provisions of the Native Allotment Act. ^{8/}

A slightly different fact situation was presented in Forest Service, USDA, (Heirs of Archie Lawrence), 128 IBLA 393 (1994). This case involved a Forest Service appeal of a decision reinstating a Native allotment application filed by Archie Lawrence. The Lawrence application had originally been filed in 1915, alleging occupancy since 1895 of a 160-acre parcel of land. The land had been included in the Tongass National Forest in 1902. The land was surveyed in 1920, and, while only 35.49 acres were surveyed, no improvements were found. Lawrence died on June 7, 1922. An investigator interviewed Lawrence's widow, who reportedly admitted that no improvements had been made on the property. The application was held for rejection by decision dated October 4, 1924. In the absence of an appeal, it was rejected by the GLO on May 19, 1925.

Though BLM reinstated the claim on December 2, 1980, a protest filed by the State required adjudication under the Native Allotment Act. While

^{8/} While the correctness of this decision is challenged subsequently in the text of this opinion, there is one aspect which deserves special note here. Relying on the Titus decision, the opinion asserted that "[e]ven assuming the November 1927 decision was properly served and would ordinarily be final in the absence of a timely appeal, Reese's application is considered to have been pending before the Department on December 18, 1971, for purposes of section 905(a) of ANILCA." Id. at 351. This holding, of course, can be traced to the faulty analysis of the district court's Olympic holding, first advanced in State of Alaska, supra.

immediately after reinstatement the master title plat (MTP) showed the parcel as it had been surveyed in 1920 (i.e., 35.49 acres), in 1992, the MTP was redrawn to show the original 160-acre parcel. When BLM formally reinstated the Lawrence allotment application as a 160-acre parcel, the Forest Service appealed, arguing that this enlarged parcel would impinge upon planned timber sales and that it had relied upon the earlier MTP as limiting the parcel to 35.49 acres.

In its decision, the Board rejected the Forest Service's argument that Lawrence's claim had been properly rejected in 1925, asserting that "lack of compliance with Pence vitiates the administrative finality that would otherwise attend" rejection of an allotment and concluding that Pence had been violated because "no hearing was offered Lawrence's heirs prior to the 1925 GLO rejection of this allotment application." Id. at 396.

In the Board's next decision, Lena Baker Maples, 129 IBLA 167 (1994), it returned to the Silas approach. Maples' Native allotment application had been filed on September 23, 1971, alleging use and occupancy commencing in 1966. The application was rejected on June 14, 1974, because of a failure to submit proof of use and occupancy predating a State selection application filed on January 14, 1964. An attempted appeal by the Bureau of Indian Affairs (BIA) on Maples' behalf was apparently unauthorized, and the appeal was dismissed on January 30, 1975.

On September 22, 1987, BIA sought reinstatement of the application. The Bureau ultimately rejected reinstatement based on the Board's decision in Silas. On appeal, while Maples argued that Silas was wrong and conflicted with a number of other Board decisions, IBLA affirmed on the basis of the Silas precedent. The decision in Maples noted that, taking all of the averments on her application as true, her Native allotment application was still subject to rejection as a matter of law since her use and occupancy did not commence until the land was no longer available for appropriation under the Native Allotment Act. While she subsequently sought to assert earlier use, the Board noted that this assertion did not occur until 1988, 14 years after the application had been rejected. Declaring that "[t]he burden of proof lies with the party seeking reinstatement and that party must submit evidence that clearly demonstrates that the original application contained a significant error," the Board discounted Maples' 1988 assertion that the 1966 date had been included on the application in error as "a self-serving statement with no corroboration in the record." Id. at 171.

An important variant in the factual situations previously examined was presented in State of Alaska (Heirs of Peter Wise), 130 IBLA 83 (1994). In this case, Wise had filed an allotment application on April 19, 1960, together with a metes and bounds description and a map. The description, however, did not close. Accordingly, on August 17, 1960, BLM notified him that his application was being held for rejection because of the defective description and giving him 30 days to file an amended description, failing in which the application would be rejected without further notice. Wise received the decision but never responded, and the case was closed. In 1987, a 1977 State selection covering the land was tentatively approved.

While the facts leading up to it are not clearly described, the application was subsequently reinstated by BLM in a decision dated December 18, 1990. The State of Alaska thereupon appealed.

The Wise decision commenced its analysis of the correctness of BLM's decision by reasserting that there was "an important exception to the doctrine of administrative finality" in cases in which an allotment application had been rejected without an opportunity for a hearing on a disputed issue of fact. *Id.* at 84, citing *Ellen Frank, supra*. Totally sidestepping the fact that the metes and bounds description did not close and, thus, did not "describe" anything, ^{9/} the decision asserted that "in this case the disputed question concerns whether Wise wanted the land claimed to have been used and occupied by him in his application, as his heirs contend he did." Accordingly, the decision rejected the State's protest.

While the decision in *State of Alaska (Heirs of Willie Takak)*, 135 IBLA 1 (1996), generally followed the course charted in *Sockpealuk* and is not of particular note, the decision in *Winifred A. Otten*, 136 IBLA 166 (1996), does deserve analysis. Otten had filed two different allotment applications aggregating a total of 320 acres. The first application, filed in 1968, sought two parcels (ultimately designated Parcels D and E), described as aggregating 160 acres, and claimed occupancy commencing on March 19, 1968. The second application, which was signed on January 12, 1971, and which BLM treated as an amendment of the first application, sought three parcels (Parcels A, B, and C) also described as aggregating 160 acres. A BLM field investigation concluded that Otten had used Parcels A, B, and C. Otten was advised that, since she could only obtain a total of 160 acres, she would have to relinquish the 160 acres described in her original application if she wished to obtain the acreage in the 1971 application. Otten, however, never filed a formal relinquishment.

While BLM approved Parcels A, B, and C on April 26, 1976, a formal survey of these parcels showed that they contained only 123.09 acres, and a certificate of allotment for that acreage issued on March 20, 1985. In any event, by decision dated May 16, 1979, BLM rejected Parcels D and E based on Otten's failure to submit proof of qualifying use and occupancy during the statutory life of the application. Following the adoption of ANILCA, however, BLM reinstated Otten's Native allotment application as to Parcels D and E on February 21, 1986. A subsequent field examination concluded that Otten had used and occupied the land as required, though it was also noted that Otten was only entitled to 36.91 acres since she had already been allotted 123.09 acres.

Otten eventually relinquished all of Parcel E and all acreage in Parcel D in excess of a 36.91-acre tract. A survey of the reduced Parcel D was conducted and the plat officially filed on September 11, 1991.

^{9/} It should be noted that the heirs of Wise had argued that the map was sufficient to, at a minimum, create a disputed issue of fact as to the situs of the land sought. The decision, however, did not embrace this argument.

Notwithstanding the foregoing, by decision dated April 29, 1993, BLM held that the application for Parcels D and E had terminated as a matter of law when she failed to submit the required proof of use and occupancy, citing this Board's decision in Heirs of Edward Peter, *supra*. An appeal soon followed.

Before the Board, Otten assailed the decision in Edward Peter as contrary to the law and, relying on Howard, *supra*, argued that Edward Peter had been erroneously decided. While in its decision, the Board agreed that, under Howard, section 905(a) of ANILCA governed disposition of Otten's appeal because the allotment application had clearly been pending on December 18, 1971, the Board did not agree that this was inconsistent with application of the Edward Peter decision. ^{10/} Indeed, pointing out that a Native Regional Corporation's protest prevented legislative approval, the Board concluded that both Howard and Edward Peter were applicable.

The Board in Otten agreed with BLM that, under Edward Peter, ^{11/} the record as it existed when BLM rejected the original application, justified rejection of the application without a hearing since the record "was devoid of evidence that Otten completed the requisite 5 years use and occupancy of Parcels D and E." *Id.* at 175. However, the Board continued, subsequent to this action, the Bureau had developed evidence which showed that Otten had, indeed, used the lands within Parcels D and E as required by the Native Allotment Act. Based on this evidence, the Board concluded that "Otten is entitled to have her application for Parcel D as presently identified reinstated." *Id.* ^{12/}

^{10/} While the Board discussed a purported conflict between Howard and Edward Peter, it did not address the more direct conflict, pointed out above, between Howard and the decision in Franklin Silas, *supra*. By applying Howard, the Board avoided the initial question of whether the application could be reinstated absent a showing that it had been rejected in error. The decision in Otten, thus, assumed that the application was subject to either legislative approval or readjudication under the Native Allotment Act as a predicate of its analysis not as a conclusion of its adjudication.

^{11/} It is worthy of note that Otten characterized the decisional process followed in Edward Peter as: "Absent legal or equitable reasons for reconsidering the termination of the 1962 allotment application, the Board upheld BLM's termination under the doctrine of administrative finality." *Id.* at 174 (emphasis supplied).

^{12/} This last sentence is somewhat symptomatic of the conceptual confusion which has been creeping into Board decisions. Under Howard, as had been noted earlier in the Otten decision, there was no requirement to "reinstate" an application which had been rejected after Dec. 18, 1971, since those applications were deemed to be automatically subject to the provisions of § 905 of ANILCA. The reinstatement requirement is part of the Franklin Silas analysis which basically repudiated the Howard decision.

Thus, in effect, the Board in Otten both explicitly embraced and implicitly rejected the Howard precedent.

In United States v. Heirs of Yaquam, 139 IBLA 376 (1997), the Board again dealt with issues arising out of rejection of Native allotment applications in the distant past. Jake Yaquam had filed an allotment application in 1915, alleging use of land around Ground Hog Bay since boyhood. A GLO examiner found that Yaquam had not used the land, which Yaquam had apparently described as an old village site, during the past 60 years and that one Robert Greenwald had built a house on part of the land.

Despite Yaquam's assertions that he desired to live on the parcel, the examiner recommended rejection of the Native allotment application. After Yaquam failed to respond to a notice holding the claim for rejection, it was rejected by decision of February 8, 1918. There was no appeal, and Yaquam died on December 31, 1918.

The claim was reinstated by BLM in 1980 and, in 1989, BLM initiated a contest of Yaquam's allotment application. After a hearing, Administrative Law Judge Ramon M. Child concluded that Yaquam had used and occupied the land in a manner at least potentially exclusive of others. The Bureau then appealed to the Board. In affirming Judge Child's decision, the Board concluded that he had appropriately accorded greater weight to the testimony of Yaquam's daughter than to statements originally submitted to the GLO by the field examiner. The most noteworthy aspect of this case, it seems to me, is the application by Judge Child of the 5-year use and occupancy standard and the Board's seeming approval of this standard. 13/

The last Board decision which I wish to examine in detail is Louie A. John, 142 IBLA 18 (1997). John had filed his Native allotment application on March 29, 1971, alleging use and occupancy of a tract of land, designated as containing 160 acres, commencing on November 8, 1964. This application was rejected on December 4, 1972, because the land was not available at the time that John had allegedly commenced occupancy. The Bureau's records indicated that the land had been included in a withdrawal dated March 21, 1963, and had ultimately been included in a Power Site Classification for the Rampart Canyon Power Project. It should be noted that an earlier material site right-of-way had been issued for a 3.44-acre parcel also included within John's application. John filed no appeal from this decision, and the case file was closed.

On March 12, 1980, even before the adoption of ANILCA, this application was reinstated on BLM records. After ANILCA was adopted, the State of Alaska filed a protest under section 905(a)(5), 43 U.S.C. § 1634(a)(5) (1994). A subsequent field report indicated that John had used and occupied the land in conformity with the Native Allotment Act. In 1985 and

13/ Yaquam's heirs had asserted that "the proper law to apply is the law existing at the time the application was filed and rejected." 139 IBLA at 382. In this regard, I would note that the requirement that an allotment applicant show 5-years use or occupancy was not initially promulgated as a regulation until 1935. See Circular No. 1359 (June 22, 1935); 43 C.F.R. § 67.13 (1938).

1986, BLM issued an interim conveyance of some of the land surrounding the application to Danzhit Hanlaili Corporation and Doyon, Ltd., expressly excluding the land within John's application in secs. 1 and 12, T. 10 N., R. 16 E., Fairbanks Meridian. In 1990, however, a survey of the land showed that the parcel included not only part of secs. 1 and 12, T. 10 N., R. 16 E., but also parts of secs. 6 and 7, T. 10 N., R. 17 E. These latter sections had not been withdrawn for the Rampart Canyon Power Project.

A 1992 BLM proposal to approve the John allotment required action by Danzhit and Doyon to disclaim interest to certain lands within the surveyed allotment application for which they had obtained interim conveyance. This was accomplished by June 2, 1992. Twenty days later, the State Office issued a decision approving John's Native allotment application. While this decision reserved a 200-foot easement for the Steese Highway, it rejected both a State selection and the material site right-of-way. The State thereupon appealed.

On February 16, 1993, while the State's appeal was pending before the Board, BLM moved to have its July 22, 1992, decision vacated. Since the State concurred, the Board, by order dated July 29, 1993, vacated the July 1992 decision and remanded the case to BLM for further action. Thereafter, by decision dated March 7, 1994, BLM rejected John's allotment application, concluding that it had been properly rejected in December 1972 and should not have been reinstated. John then appealed to the Board. While John and the State were able to achieve a mutually satisfactory settlement, BLM refused to agree. Accordingly, it was necessary for the Board to directly address the issues raised by the parties therein.

At the outset, the Board rebuffed BLM's assertion that the Board's Silas decision had constituted an application of the doctrine of administrative finality, noting that the Board had expressly rejected that characterization in Franklin Silas (On Judicial Remand), *supra*. See 142 IBLA at 26-27. Following the Howard rationale, the Board then asserted that section 905(a) of ANILCA required reinstatement of those Native allotment applications pending on December 18, 1971, which had been rejected sometime thereafter. Accordingly, the Board concluded that the March 7, 1994, decision was in error.

Of equal importance, the decision also rejected application of the Board's Silas precedent on the ground that, while the land sought, as described in the application, was, at that time, in total conflict with a powersite withdrawal, the land sought, as marked on the ground, was not in such a conflict. The Board concluded that "as [a]ppellant's amended Native Allotment Application described land that was not subject to PLO No. 3520, as well as land that was, it cannot be said that the application on its face revealed a legal defect which, as a matter of law, required the rejection thereof." *Id.* at 28. Therefore, the decision concluded that the initial rejection of the application had been a violation of the Pence hearing requirements. *Id.*

While this basically brings us up-to-date insofar as Board decisions are concerned, there is one additional Federal court decision which also impacts on this issue. In Lord v. Babbitt, 943 F. Supp. 1203 (D. Alaska 1996), the United States District Court for Alaska dealt with cross-motions for summary judgment in a statutory life case. Walter Lord had filed a Native allotment application on May 24, 1957, alleging use and occupancy commencing at that time. On January 4, 1963, BLM sent Lord notice at his address of record that he was required to submit proof of qualifying use and occupancy by May 24, 1963, to prevent the allotment application from expiring under the regulations. Lord did not respond and eventually asserted that he never received this notice. On May 31, 1963, BLM sent Lord a notice that his allotment application has been terminated, which notice was signed for by his wife, though Lord later claimed that his wife did not tell him of the letter for many years.

In 1972, the State of Alaska specifically selected the land described in Lord's allotment application, and, in 1976, it received tentative approval therefor. Under section 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1994), the United States confirmed the State's title to the land "subject only to valid existing rights and Native selection rights under [ANCSA]." On November 12, 1985, the land was patented to the State pursuant to 43 U.S.C. § 1635(c)(2) (1994).

Before the district court, Lord claimed that it was only in 1994 that he was informed that his application would not be reinstated. Lord attempted to avoid application of the 6-year statute of limitations found at 28 U.S.C. § 2401(a) (1994) by arguing that ANILCA constituted a legislative waiver of the statute of limitations with respect to appeals by Alaska allotment applicants whose applications had been denied without an opportunity for oral hearing prior to December 18, 1971. In rejecting this argument, the court noted:

This argument is foreclosed by Silas v. Babbitt, 96 F.3d 355 (9th Cir. September 4, 1996) which was decided after briefing was completed in this case. In Silas, the Ninth Circuit held that only those applications pending on or before December 18, 1971 were legislatively approved. If an application had been properly denied before that date, it was not "pending" and therefore did not have to be readjudicated. If Lord's application was legally terminated in 1963, which is the issue before this Court, then it was not confirmed by Congress in ANILCA.

Id. at 1208. The court, however, denied the Government's cross-motion to dismiss on the ground that the question of the adequacy of the notice was the linchpin for determining whether equitable tolling of the statute of limitation had occurred. The court did not rule on whether the rejection was in violation of the Department's own statutory life policy or whether it violated the Pence right to a hearing. Id. at 1211.

In my view, the foregoing review of Board and court precedents starkly illuminates some theoretical inconsistencies in recent Board decisions

concerning the reinstatement of rejected or terminated Native allotment applications. It is time, I believe, for the Board to begin to make a concerted effort to establish greater consistency in its adjudications in this area of the law. Along those lines, I would suggest the following considerations.

First, the Board's decision in Frederick Howard, *supra*, which established a dichotomy between applications rejected prior to December 18, 1971, and those rejected after that date is flatly inconsistent with its subsequent ruling in Franklin Silas, *supra*. Given that the Silas decision was ultimately affirmed by the Ninth Circuit Court of Appeals in Silas v. Babbitt, *supra*, the decision in Frederick Howard can no longer be considered "good law," and it should not be cited as if it were.

Second, the Board's decisions in Michael Gloko, *supra*, and Andrew Balluta, *supra*, which required actual notice of the rejection of Native allotment applications for failure to submit evidence of use and occupancy within 6 years of the filing of an allotment application are similarly inconsistent with the Board's ruling in Heirs of Edward Peter, *supra*, which, relying on the express language of the regulation, held that no such notice was needed. While no court decision can be said to mandate the choice of precedential lines, in my view the Edward Peter rationale clearly represents the superior theory, one consistent with the position which the Board has generally adopted in other areas of adjudication, and I would, therefore, endorse the express overruling of both Gloko and Balluta. In any event, regardless of which line of precedent is ultimately selected, the Board should, at a minimum, avoid citing cases from both lines in the same decision. See, e.g., Winifred A. Otten, *supra*.

Third, it seems to me that in no aspect has the Board been more quixotic than in its repeated, though by no means unwavering (see, e.g., Winifred A. Otten, *supra*, at 174; Heirs of Edward Peter, *supra*, at 113), renunciation of the doctrine of administrative finality as a rationale for its decisions dealing with reinstatement of rejected Native allotment applications. Thus, while the Board's decision in Franklin Silas (On Judicial Remand), *supra*, can justifiably be read, on the one hand, as an express repudiation of administrative finality as a basis for decisionmaking, the proffered explanation of the decisional process which resulted in the original Silas opinion can, on the other hand, just as easily be seen as an application of that doctrine. See Franklin Silas (On Judicial Remand), *supra*, at 16 ("We found no compelling legal or equitable reasons for allowing a second opportunity to appeal the merits of the 1972 decision 15 years after the expiration of time for appeal from the 1972 decision.") Nor is the Silas case unique in applying administrative finality concepts in the allotment reinstatement context, notwithstanding repeated assertions in other decisions that these considerations have no applicability in this field. Compare Lena Baker Maples, *supra*; Heirs of Edward Peter, *supra*, with Louie A. John, *supra*.

This duality of approach seemingly finds its origins in a fundamental misconception as to the operation of administrative finality in the

decisional context. In those decisions which have been most fervent in rejecting application of this doctrine, there has been a tendency to view administrative finality as requiring the automatic rejection of any attempt to reinstate an application where the applicant had been afforded an opportunity to appeal but had, for some reason, failed to avail him or herself of that option. ^{14/} By contrast, in those decisions which have embraced application of administrative finality concepts, there has generally been an express recognition that the considerations involved in its application are jurisprudential, not jurisdictional, and, therefore, in those situations where equity and justice so dictate, administrative finality presents no absolute bar to reinstatement of a rejected application. ^{15/}

I believe that the Board should explicitly embrace the approach that it has, in practice, generally been following and expressly recognize that the doctrine of administrative finality is applicable to the reinstatement of Native allotment applications. If nothing else, such action would resolve a substantial amount of the conflict in our adjudications on this issue. More importantly, recognition of the applicability of the doctrine of administrative finality to issues arising out of the reinstatement of previously rejected Native allotment applications would, I believe, go a long way toward illuminating an ancillary area of allotment adjudication which has also suffered from analytical obscurity. I refer to those Board decisions interpreting the import of that part of section 905(a) of ANILCA which provided for the legislative approval or adjudication of Native allotment applications pending "on or before December 18, 1971."

As was noted above, subsequent to the issuance of Olympic v. United States, *supra*, a number of Board decisions have suggested that, where a Native allotment application was rejected prior to December 18, 1971, a

^{14/} A variant on this approach can be seen in those decisions which differentiate between a general administrative finality doctrine and the "important exception" which they deem applicable in Native allotment adjudications. See, e.g., State of Alaska (Heirs of Peter Wise), *supra*, at 84; Ellen Frank, *supra*, at 351. This, of course, is not an "important exception" to the doctrine of administrative finality which is somehow *sui generis* to Native allotment adjudications; rather, it is the application of a general qualification which is central to the rule, itself.

^{15/} Indeed, numerous Board decisions have described the doctrine of administrative finality as providing that

"when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice." Mary Sanford, 129 IBLA 293, 298 (1994) (emphasis supplied), and cases cited. This has been true even in the area of reinstatement of rejected Native allotments. See, e.g., Mitchell Allen, *supra*, at 336.

subsequent determination that this rejection occurred on the basis of a disputed issue of fact without an opportunity for an oral hearing necessitates a finding that the Native allotment application was properly considered "pending on December 18, 1971" for purposes of section 905(a) of ANILCA. See, e.g., Heirs of George Titus, *supra*, at 4 n.4; Ellen Frank, *supra*, at 351. As was also indicated above, I believe this analysis is premised on a fundamental misreading both of the Olympic decisions and ANILCA.

The Board's decision in Mary Olympic was not based on the jurisprudential considerations which surround the doctrine of administrative finality but rather was clearly premised on the jurisdictional constraints imposed by Congress in its adoption of a savings clause in ANCSA, 43 U.S.C. § 1617(a) (1994), which permitted the continued issuance of Native allotments even after the repeal of the Native Allotment Act in response to applications "pending before the Department of the Interior on December 18, 1971." In effect, section 905(a) of ANILCA removed the jurisdictional bar interposed by ANCSA and allowed the Board to consider whether or not to reinstate previously rejected claims. But, as the legislative history of ANILCA makes clear, reinstatement was only required of those applications which had been "erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing."

S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in 1980 U.S.C.C.A.N. at 5182. Accord, Silas v. Babbitt, *supra*, at 358-59.

Section 905(a) might best be seen as both a grant of authority to consider those allotment applications previously rejected as well as a legislative finding that, while the doctrine of administrative finality could be applied with respect to those applications, it should not be applied where the application had erroneously been rejected without affording the applicant an opportunity for a Pence hearing. However, it must also be noted that nothing in ANILCA constituted a legislative finding that only those applications erroneously rejected without a Pence hearing were eligible for reinstatement. On the contrary, it seems reasonably clear that Congress intended that any application of the doctrine of administrative finality would be guided by the jurisprudential considerations usually attendant thereto. Thus, where application of the doctrine would result in a manifest injustice or where other compelling legal or equitable considerations existed, the prior rejection of an allotment application would not be an absolute bar to its reinstatement even if there had been no violation of Pence hearing requirements.

I think this last point is of considerable importance since it provides the only theoretical justification for the reinstatement of the application in Olympic, itself. A number of decisions have suggested that reinstatement of the Alexis Gregory application was the result of the application of the Congressional mandate relating to applications erroneously rejected without the opportunity for a hearing. The problem, however, is that nothing in the Department's handling of the Gregory application could fairly be said to have violated the Pence hearing requirements.

The Pence opinions did not require that a hearing be afforded in every case. On the contrary, in Pence v. Andrus, supra, the court expressly agreed that where an allotment application was being rejected as a matter of law, no Pence hearing was necessary. Hearings were required only where rejection was dependent upon the resolution of a disputed issue of fact. Id. at 743. The reality of the matter, however, is that, in Olympic, there was no disputed issue of fact.

While BLM had rejected the Gregory application because the land described was not the situs of the improvements listed, no one ever asserted that the BLM decision was wrong. On the contrary, almost the entirety of the court's analysis in Olympic was directed to a refutation of the Government's assertion that the effect of section 905(a) was "[t]o convey to an applicant's heirs a parcel of land, but not the land which the applicant used and improved and for which the applicant intended to apply." 615 F. Supp. 994. Indeed, the court expressly rejected the Government's attempt to grant Gregory's heirs an allotment covering the land described in his application. Id.

It seems elementary to me that rejection of a Native allotment application because it embraces land for which an applicant does not intend to apply, where all parties agree that this is the case, simply does not require a Pence hearing. Thus, the Gregory application was not "erroneously rejected * * * without an opportunity for hearing." It was, in fact, correctly rejected for the very reason given by BLM. Reinstatement of the Gregory application could only be justified on an implicit finding that application of the doctrine of administrative finality under the circumstances disclosed would result in a manifest injustice since it would effectively preclude attempts by Gregory's heirs to establish the situs of the land for which they believed Gregory intended to apply. 16/ Whether or not the court in Olympic clearly delineated the foregoing as the basis for its actions, this interpretation is not only consistent with Pence, it represents the only way of reconciling the outcome in Olympic with the subsequent decisions in Silas v. Babbitt, supra, and Lord v. Babbitt, supra.

16/ Indeed, there would be support for such a conclusion in the Board's own decision on reconsideration. Thus, the Board opined:

"We admit that, considering the unusual nature of this case, BLM might have looked favorably on a petition for reconsideration had one been filed.

One was not. One could best characterize the status of the application, therefore, as finally rejected with a possibility of reactivation. This possibility, however, ended when Congress repealed the Native Allotment Act on Dec. 18, 1971, save for those applications then 'pending.'"

Mary Olympic (On Reconsideration), supra, at 35. Since ANILCA effectively eliminated the jurisdictional bar to "reactivation," reinstatement of the application would seem to be fully in accord with the factual analysis of the Board.

The infirmity which a number of Board decisions implicitly ascribe to Olympic, i.e., the reinstatement of an allotment application based on Pence even though Pence would not apply, has been replicated in a number of the Board's own decisions. Thus, in State of Alaska (Heirs of Peter Wise), supra, the Board found it a violation of the Pence hearing requirement to reject a Native allotment application on the ground that the description did not close without first affording Wise the opportunity to establish that "Wise wanted the land claimed to have been used and occupied by him in his application." Inasmuch as BLM's assertion that the description which Wise had provided did not close was undisputed, the basis for the Board's reversal in Wise can most charitably be described as obscure. It would seem to me self-evident that no Pence hearing is required to reject an application which describes nothing.

Similarly, the Board's decision in Ellen Frank, supra, simply manufactured a disputed issue of fact where none was apparent. As noted above, in Frank, the allotment application of John Reese had initially been approved by the First Assistant Secretary. When, before completion of survey, it was discovered that Reese had died, the improvements had been destroyed by a forest fire, and that his wife had moved away with no apparent intention of ever returning, the prior approval was revoked and the applicant (and presumably his heirs) were afforded 90 days in which to show cause why the application should not be rejected. In the absence of any showing, the Commissioner of the GLO rejected the allotment in 1927.

When BLM refused to reinstate the application almost 60 years later, an appeal was filed with the Board. In its decision, the Board justified reinstatement of the application on the finding that the allotment application had been rejected without a hearing on a disputed issue of fact, a dispute which it characterized as "whether Reese's widow wanted the land originally sought by him." Id. at 351. Notwithstanding this holding, however, the decision offered not the slightest support to buttress either the assertion that there was an outstanding question as to whether or not Reese's widow wanted the land or that this desire, unless coupled with an intention to return to the land sought, had any relevance to whether or not the GLO would have granted an allotment under allotment principles then being applied. ^{17/} But, having determined that the application had been improperly rejected without a hearing, the Board went on to direct BLM to adjudicate the application under the 1906 Act, an adjudication which, the decision further asserted in the face of the original rejection of the application in 1927, "has yet to occur."

It seems to me that an understanding of the real thrust of section 905(a) of ANILCA, coupled with an appreciation of the correct

^{17/} Moreover, the basic question of whether Pence hearing requirements can properly be retroactively applied to situations arising 25 years before the adoption of the Administrative Procedure Act deserves far more analysis than it has thus far received in the Board's deliberations.

application of the doctrine of administrative finality, would go far towards obviating the need to invent fanciful "disputed issues of fact" as the only way to effectuate a result deemed to be consistent with the ends of justice. Just as importantly, it would provide us with the flexibility to judge each allotment case separately in order to determine whether or not administrative finality is properly applied or whether considerations of equity and justice require that we reinstate the allotment application. 18/ In any case, I believe those who submit their appeals to this Board have a right to expect that its decisions will be guided by universally applicable principles and not be determined solely by a panel's unconstrained choice among conflicting precedents. It is time for the Board to address the theoretical inconsistencies in its precedents outlined above.

Turning to the present case, the lead opinion justifies reinstatement of Demoski's allotment application because no hearing was provided on the question of whether the land was prospectively valuable for oil and gas. Presumably, the conflict finds its origins in the fact that Demoski attested, in his allotment application, that the land was nonmineral-in-character. While I would admit that, under the Sockpealuk analysis, this was arguably a conflict on the face of the application and, thus, rejection could not occur as a matter of law, it seems to me a relatively weak reed on which to premise a finding that the Pence hearing requirement was violated, particularly in the absence of any real assertion that the land was not prospectively valuable for oil or gas.

More compelling to my mind is the fact that the status of the land as prospectively valuable for oil or gas was not preclusive of a grant of the allotment. Rather, the allotment would issue subject to a reservation for oil or gas. Moreover, as the lead opinion points out, not only was the regulatory authority for requesting a waiver in 1961 by no means clear, in less than a year, the requirement that an allotment applicant file such a waiver had been abolished. See generally Milton H. Lichtenwalner, A-28825 (May 31, 1962). Given this legal construct, I do not believe that administrative finality should serve as a bar to reinstatement of the application.

Whether or not the application is ultimately approved, however, must await further consideration by BLM. While this allotment is clearly not subject to legislative approval, I do believe that invocation of the

18/ Furthermore, the determination of whether equity and justice require reinstatement of a Native allotment application would permit consideration of the length of time between rejection and the attempted reinstatement as a factor in determining just what equities exist. There can be substantial differences in equities between an allotment application rejected in the 1920's and one rejected only 10 years ago. These differences are effectively obscured by those decisions which simply search for some "disputed issue of fact" to serve as a basis for automatic reinstatement.

Aguilar procedures is appropriate for the purpose of making an initial determination as to how to proceed. Accordingly, for these reasons, I concur in the lead opinion's disposition of this appeal.

James L. Burski
Administrative Judge

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